



PUGET SOUND ENERGY

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Washington State
Department of Ecology

November 6, 2006

Mr. Tom Loranger
Program Manager
State of Washington Department of Ecology
P.O. Box 47775
Olympia, WA 98504-7775

**Re: Puget Sound Energy's Comments Regarding Draft Report of Examination for
Water Right Application No. S2-29934**

Dear Mr. Loranger:

PSE appreciates the opportunity to review and provide comments regarding the above-referenced draft Report of Examination ("ROE"). As the applicant, PSE hopes these comments will assist Ecology in finalizing an approval of the applications for the Lake Tapps Reservoir Water Supply Project ("WSP").

As a general observation, the analysis regarding a few of the elements of the WSP in the main text of the draft ROE is not accurately reflected in the final findings and conditions in Sections 4 and 5. This is understandable based on the length and complexity. Some of the comments below discuss these inconsistencies.

There are also references in the ROE to the historical operations of the White River Hydroelectric Project, the effects of hydropower operations on various resources, and references to the Federal Energy Regulatory Commission's (FERC) jurisdiction over hydropower operations. While this is primarily background information and is not material to the findings and conditions in Sections 4 and 5 of the ROE, there are a number of inaccuracies in these references. PSE directs Ecology to the record for a more accurate description of the historical operations of the White River Hydroelectric Project and PSE does not waive its right to address these matters in the future.

1. Introduction

PSE has previously stated that PSE is in negotiations with Cascade Water Alliance ("CWA") to be the purveyor of the water. PSE has not yet entered into a contract with CWA to affect the transfer of any assets. Such a contract is not and should not be considered a condition precedent to approval of the application. PSE will be responsible, whether with CWA or others, to purvey the water under the authority and conditions of the water permits. Please *see* specifically Sections 1 and 5.2.1, (pages 6 and 84).

2.0 Description of the Proposed Water Supply Project

2.2.1 PSE asks that Ecology state PSE's position regarding the purpose of PSE's existing water right represented by the "claim." This water right was created for both the maintenance of a reservoir as well as hydropower and other beneficial uses. While a primary purpose of the reservoir was for hydropower production, the intent and historical record shows the diversion and the reservoir has been operated to maintain water quality and for other water related uses, such as recreation. As you know, the application to change this water right was filed only to facilitate the process and confirm these additional uses. The ROE does correctly recognize the historical operation of the reservoir to manage the diversion and release of the water to "meet the essential goals of power production demand, recreational lake levels, maintenance, and control of the growth of aquatic plants" among other purposes. *See* 2.2.3.1. Please clarify that historical operation was for recreation as well as water quality, and not just hydropower.

2.2.3.2 Ecology has relied on modeling impacts of the WSP assuming baseline operations at "Agency 10(j) minimum instream flows." The draft further states that "PSE has agreed to manage diversions into Lake Tapps in a manner consistent with maintaining these minimum flows as a condition of the change to its claim on the White River....." This is not an accurate statement. As the draft already states, PSE's water right has no instream flow conditions other than a 30 cubic feet per second ("cfs") limit, and 130 cfs based on a contract that is not otherwise regulated or protected by the state. PSE has no agreement to diminish its existing water right. As you know, for an application to change a surface water right, Ecology is limited to considering impairment on other existing water rights caused by the change of a valid water right. Ecology cannot add conditions beyond this limited review authority.

Notwithstanding the above, PSE understands that Ecology will have the Agency 10(j) minimum flows as a condition of its water right. Please state in the ROE that PSE does not waive its rights as described above to diversions (up to 2,000 cfs) that PSE deems necessary for managing and maintaining the reservoir. In addition, the ROE should state that PSE's acceptance of a minimum flow condition on its existing water right is based on

PSE's intent to obtain a water right for the WSP. The minimum flow condition on the existing right should therefore be considered a mitigation element in the permit decision for the WSP.

The compliance point should be downstream of the fish diversion screen return flow.

- 2.3.1 The ROE states that the decision to approve the application to change the existing water right will limit diversions to 500 cfs during refill and 375 cfs at other times. PSE has not agreed to such a limitation on its 2000 cfs existing water right. Again, PSE has a right to change its existing surface water right based only upon considerations of impairment to existing water rights. When water is not diverted for hydropower, PSE has the authority to fully exercise the right to maintain the reservoir as it has in the past, including a maximum diversion to refill and maintain the quality and level of the reservoir.

2.3.4.1 Minimum Instream Flow Compliant Diversion ("MIF Compliant Diversion")

PSE has not agreed and will not agree to the MIF Compliant Diversion as a condition of the approval of the application to change its existing water right. Please delete this reference.

PSE also questions the usefulness of the MIF Compliant Diversion condition, and asks that this be deleted as a condition of the ROE. This condition will be cumbersome at best to implement. PSE recognizes that without the MIF Compliant Diversion, there will be more days when the MIF's are not met. However, the agreement to provide modified Agency 10(j) flows in the White River and the other benefits from the WSP should outweigh the impacts to the Lower Puyallup River under the overriding consideration of public interest standard. See 90.54.020(3)(a).

If the MIF Compliant Diversion is retained as a condition, it must be established with a maximum yearly quantity based on what impacts the WSP will truly have on the Lower Puyallup River MIFs. As drafted in the ROE, PSE is supplementing MIFs even if excursions are caused by water users junior to the WSP water right. The primary impact on MIFs may be from junior diversions in the upper Puyallup basin, including developments using the ground water exemption. Mitigation under the MIF Compliant Diversion will only increase over the years to compensate for these junior uses, and create uncertainty for the WSP and compromise recreational reservoir levels. PSE cannot be regulated to protect the junior users. Therefore PSE requests that the MIF Compliant Diversion condition, if retained, place a maximum annual limit on the water that PSE would have to allow to pass by the diversion point or release from the reservoir in excess of the diversion. The maximum amount should be that quantity of water estimated from current modeling of the WSP impacts on Puyallup MIFs over the last 12 years. This

quantity of water can be "banked" and released under PSE's management of the reservoir under its existing right at Ecology's discretion when MIFs in the Puyallup are not being met. Please consider having different quantities of water for normal dry and drought years.

In addition, as currently written, the requirement in this section would prohibit the withdrawal of water from the White River to meet the needs of the fish diversion screens return flow. This needs to be modified to allow withdrawals to meet the needs of the fish diversion screens return flow.

2.3.4.3 Land Conservation¹

The statement in regard to PSE's agreement to the transfer of 2500 acres of land is correct. The language in 3.4.4.3, 4.1 and 5.3.8 needs to be revised to be consistent with 2.3.4.3. The correct statement is as follows:

PSE has offered to conserve land owned by PSE in the White River watershed as an element of the water supply project application process. In this regard PSE has committed to transfer 2500 acres of mostly riparian land in the White River Basin to a land conservancy group whose mission is to preserve natural open space lands and maintain public access. PSE is currently working with the Cascade Land Conservancy (CLC). CLC is a private, non-profit organization that preserves natural and open space lands in urban and rural communities, along rivers and streams, and in the foothills of the Cascades. CLC works collaboratively with individual landowners, organizations, tribes and local governments to protect and steward our community's treasured landscapes. CLC's strategies range from land purchases and donations to conservation easements and ownership agreements. It is common for the CLC to transfer land to other parties with conservation covenants and easements that follow the transfer of the land and that continue to protect the resources. CLC's goal is to maximize the ecological value of land while meeting the needs of landowners.

2.3.4.2 PSE recognizes that historically it would frequently drawdown the reservoir in the fall (depending upon the need to generate electricity). The intent is to now try and maintain a higher reservoir level for a longer period of time. PSE will agree to the 50 cfs release to

¹ The Table of Contents incorrectly refers to this section as 2.2.4.3. It is 2.3.4.3.

meet Puyallup River MIFs. However, PSE does not agree to a minimum release of up to 300 cfs after November 1st. There is no basis for requiring a minimum release at this time. As the ROE recognizes, PSE had not operated the reservoir on a rigid plan. Some years PSE did not drawdown the reservoir based on an estimate of snowpack and availability of water to insure a full reservoir in the spring. In addition if and until a Water Quality Study for the reservoir is complete, PSE will not guarantee minimum release from the reservoir.

3.4.1 Project Baseline

PSE does not object to the requirement to conduct a Lake Tapps Water Quality Study for the purpose of determining a diversion from the White River that would be sufficient to maintain the quality of Lake Tapps. However, the study should not be limited to 3 years, nor should it be limited to 500/375 cfs diversions. Any study, the result of which may limit PSE's 2000 cfs right, must be first developed by a team of experts. The team must determine the sufficient time and funding to develop and conduct the study in a manner that will insure in the future that any limitation of the 2000 cfs will not further impair or negatively impact the quality of the reservoir or the operation of the WSP. While PSE agrees that the diversion would be limited based on the study, PSE must have the right to protect the remaining portion of the right through a trust and continued right for potential future hydropower options.

PSE recognizes that Ecology has created a "baseline" representing PSE operations of the reservoir since hydropower ceased. However, it must be clear that PSE has the right under its existing water right to operate the reservoir much differently. PSE's right is only limited to a 130 cfs instream flow condition. The "baseline" provides much higher Agency 10(j) flows. While PSE understands that Ecology will place the Agency 10(j) flows as a condition on the change approval of the existing water right, these flows, as explained above, can not legally be required. The 10(j) flows must therefore also be considered a component of the mitigation for the WSP water rights.

In providing this comment, PSE is not requesting that Ecology model a new "baseline." PSE only requests the "baseline" be explained as already including a beneficial component of the WSP, supporting the overriding consideration of public interest. In any findings and discussions of benefits to the White River By-Pass Reach, please include the benefits of the full Agency 10(j) flows and not only the difference between modified 10(j) and Agency 10(j) flows. PSE does not otherwise waive its interests and rights to the vested 2000 cfs water right. Also *see* 3.4.2.3 and 3.4.3.3.

3.4.2.3 Potential Effects of the WSP Water Levels in the Lower Puyallup River

PSE does not waive its rights to take the position that if the WSP is implemented in a manner that it does not impair the Puyallup MIFs, PSE has no further legal obligation under the water code to address those instream flow issues, including fresh habitat, water quantity and water quality because these were elements in establishing the MIFs. *See* 3.4.4.1. (Ecology does not have authority to implement the Federal Endangered Species Act. Again, it is bound to the MIFs established in the rules and Ecology cannot change what it believes minimum flows are for instream reservoirs without amending the rule. Any amendment to the rules would be considered junior to the PSE applications.)

3.4.3 Water Quality

There are numerous statements in this section suggesting that Lake Tapps water quality has improved since flow diversions were reduced subsequent to the cessation of hydropower generation. There are also statements suggesting that low or no diversions to the lake are supportive of improved water quality. The existing data do not support these statements. What, if any "flushing flows" are needed to maintain good water quality in the lake is the subject of future studies (See 5.3.10)

3.4.3.3 Potential Effects of the Water Supply Project

As stated above, PSE requests Ecology review all of the summarized impacts to insure they are consistent with the above comments, and are consistent with the main text.

3.4.4.1 Existing Conditions

The text states "The White River Hydroelectric Project was constructed in 1911, blocking fish passage to the upper reaches of the White River". This is incorrect. The original structure constructed in 1911 had a fish ladder on it allowing upstream passage. The highest recorded salmon runs were in the White River were in the 1940s, at a time when the project had been in operation for thirty years with a minimum instream flow of 30 cfs. Subsequently, the USACE constructed Mud Mountain Dam in 1959 and built a fish trap at the PSE diversion.

4.0 Four Part Test

In regard to OCPI for the WSP, Ecology should emphasize PSE's agreement to meet the Agency 10(j) flows as a condition on PSE's existing water right. This is very important in regard to the draft finding that the WSP would cause a decrease in flows in the by-pass reach 13% of the time. This conclusion is only true based on modeling the "baseline" assumption (discussed above) of the higher Agency 10(j) minimum flows. If Agency

10(j) flows were not in the baseline the by-pass reach is not negatively impacted by the WSP.

The language to transfer 2500 acres of land must be consistent with the earlier discussion on the draft ROE. See comments above referring to Section 2.3.4.3.

- 4.2 PSE asks that Ecology reconsider its definition of beneficial use. Beneficial use, as a term of art, is defined both as a type and a manner (non-wasteful) of the use of water. See Grimes v. Ecology. Beneficial use is not defined by the requirement to use the water within a reasonable period of time. The requirement to apply the water to use within a reasonable time frame is a separate and distinct "due diligence" element of obtaining a water right.

4.3 Impairment

PSE requests Ecology delete the 500/375 cfs limitation in considering impairment. The right that PSE has and expects in the approval of the change to this right is a diversion of up to 2000 cfs without any limitation unless and until there is conclusive evidence to the contrary. See also 5.1.

5.1 Quantity Approved

This text needs to be reworded. It suggests that a maximum quantity of 72,400 af/yr may be withdrawn from the White River for water supply, recreation and water quality purposes. It should state that 72,400 af/yr may be withdrawn **plus** what is needed for recreation and water quality purposes.

5.2.1 Public Water Supply

PSE will use its best efforts to have all necessary agreements in place for an entity to purvey the water. It can not however, agree to have a firm contract within one year. This is not acceptable. There is no reason under existing law to require PSE to name another entity. Until there is a formal assignment of the water permit, PSE has the ability and authority to meet the conditions of the permit to have the water purveyed to the areas and entities described.

The required time for submission of the Water System plan is past due (2005).

5.2.2 Grounds for Extension of Construction Schedule

Ecology must review requests to extend permits as authorized under the law. The language in the ROE regarding Ecology's "considerations" cannot require conditions on PSE beyond what the law provides. PSE suggests Ecology simply state that extensions will be reviewed and considered as authorized under the law.

5.3.6 PSE requests deletion of the MIF Compliant Diversion. *See comments above.*

5.3.7 PSE disagrees with Full Drawdown Augmentation. *See comments above.*

5.3.8 This language on transfer of land needs to be revised. *See comments above regarding PSE transfer of land in Section 2.2.4.3.*

5.3.10 Water Quality Studies

PSE disagrees with proposed parameters on the Lake Tapps Water Quality Study. PSE does not object to the requirement to provide a maximum contribution to help fund the study, but will not commit to an unknown cost to fully fund a study to merely limit its existing right.

5.3.10b Tailrace Discharge Study

The water quality conditions (particularly dissolved oxygen) in the tailrace will depend on the characteristics of the flow release device selected for downstream releases below Lake Tapps and could depend on the design of the permit required tailrace barrier (5.3.13). Appropriate studies cannot be conducted until these features are resolved and not within the suggested timeframe.

5.3.11 Diversion Minimization Plan

See comments to 5.3.10 and comments above in this letter regarding flushing flows. PSE disagrees with the basis for and parameters of the study.

5.3.13 Tailrace Barrier

PSE requests Ecology reconsider the requirement for a Tailrace Barrier. Based on the limited operation of the reservoir, without hydropower, there is no need for the barrier.

5.3.1.5 Fish Screens

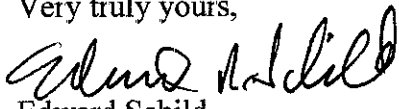
The timing of this requirement is premature. The design details and costs for fish screen

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are highly dependent on the quantity of water to be screened. It will be unknown how much flow will be released to the tailrace until after the completion of a water quality study and the intake for the new water supply project will not be constructed for many years. This requirement should not be tied to the timing of the issuance of the permit.

These comments are provided solely based on the analysis of the draft ROE. In making these comments, PSE does not waive any rights under its existing Lake Tapps water right and its rights to present evidence and arguments in any appeal of Ecology's final decision, or in any other forum for any purpose. PSE reserves the right to further explain, retract or supplement these responses as further information becomes available.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Edward Schild", written in a cursive style.

Edward Schild
Director Energy Production